APPENDIX A

Legislative History of Proposed Amendments to the Communications Act, Conferring Jurisdiction over CATV

I

On September 8, 1959, and after lengthy hearings during the 86th Congress, First Session, the Committee on Interstate and Foreign Commerce submitted Senate Report 923 accompanying and recommending passage of Senate Bill 2653, entitled "A bill to amend the Communications Act of 1934 to establish jurisdiction in the Federal Communications Commission over Community Antenna systems." The bill provided as follows:

> That section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by inserting at the end thereof the following: "(hh) 'Community antenna television system' means any facility performing the service of receiving and amplifying the signals transmitting programs broadcast by one or more television stations and redistributing such programs, by wire, to subscribing members of the public, but such term shall not include (1) any such facility which serves fewer than fifty subscribers, (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises, or (3) any such facility used only for the distribution, by wire, of programs for which a charge is imposed generally on all subscribers wherever located and which are not in the first instance broadcast for reception without charge by all members of the public within the direct range of television broadcast stations."
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> Sec. 2. Section 3 (h) of the Communications Act of 1934 (47 U.S.C. 153) is amended to read as follows:

"(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna television system shall not, insofar as such person is so engaged, be deemed a common carrier."

Sec. 3. Title III of the Communications Act of 1934 (47 U.S.C. 301 and the following) is amended by inserting therein a new section 330 as follows, entitled:

"COMMUNITY ANTENNA TELEVISION SYSTEMS

"Sec. 330. (a) No person shall operate a community antenna television system except under and in accordance with this Act and with a license granted under the provisions of this Act: *Provided,* That a community antenna television system which is in operation on the date of the enactment of this section may continue to operate until the Commission issues a license therefor: *Provided further,* That any system continuing to operate in accordance with the foregoing shall, not later than one hundred and twenty days after such enactment, submit an application for a license containing all the information required by the Commission to be submitted with such application.

"(b) (1) The provisions of sections 303, 304, 307, 308, 310, 311, 312, 313, 315, and 316 relating to stations, radio stations, broadcasting stations, licenses therefor, licensees thereof, and station operators shall apply also to community antenna television systems, licenses therefor, licensees thereof, and operators thereof.

" (b) (2) The provisions of section 317 relating to matters broadcast by any radio station, and section 326 relating to radiocommunications shall be deemed to apply also to all matter distributed to

its subscribers by a community antenna television system.

" (b) (3) The provisions of section 319 relating to construction permits shall apply also to the construction and licensing of a community antenna television system: *Provided,* That the Commission, if it finds that the public interest, convenience and necessity would be served thereby, may waive the requirement of a permit for such construction.

" (c) The public interest, convenience, and necessity will be deemed to be served by the grant of an application for a license for the provision of existing program services by a community antenna television system which was in operation on the date of the enactment of this section subject to such conditions as the Commission may impose under subsection (d) hereof.

" (d) (1) Either prior to or within thirty days after the grant of an application for a license or a renewal thereof for a community antenna television system which was in operation on the date of the enactment of this section, the licensee of a television station assigned to a community in which such community antenna television system serves subscribers may petition the Commission to include in such license such conditions on the community antenna television system's operation as will significantly facilitate the continued operation of a television station which is providing the only available locally originated television broadcast program service.

" (d) (2) Such petition shall describe, in detail, the proposed operating conditions, and shall set forth, with particularity, the material effect of the proposed conditions on such continued television station operation. The community antenna television system shall be afforded an opportunity to respond to such petition within thirty days after public announcement of the filing thereof. After the expiration of such thirty-day period, the Commission shall determine whether the petition meets the foregoing requirements, and, if it does, shall deter-

mine whether, with due regard to service rendered by the community antenna television system and by petitioner's station, the public interest, convenience and necessity would be served by the adoption of the proposed or any other operating conditions. Public evidentiary hearings shall be held thereon if requested by either the petitioner or the community antenna television station within thirty days after public announcement of such determination, or if ordered by the Commission on its own motion prior to its determination.

" (d) (3) Any community antenna television system license issued under subsection (c) above shall be subject to conditions imposed in accordance with this subsection but any such license so issued shall not be stayed pending the Commission's final decision on any petition filed hereunder.

"(e) Findings by the Commission as to the effect upon the public interest, convenience, and necessity of the grant of an application or renewal or modification thereof for a community antenna television system which was not in operation on the date of the enactment of this section or for modification of a license for a community antenna television system which was in operation on the date of enactment of this section shall be made with due regard for the desirability of facilitating the continued operation of a television station which is providing the only available locally originating television broadcast program service. The provisions of section 309 shall apply to the issuance of licenses, modifications, and renewals thereof under this subsection.

" (f) (1) Upon application by the licensee of a television broadcast station (other than a station engaged solely in rebroadcasting) which is assigned to a community in which a community antenna television system provides television programs to local subscribers, the Commission may require that such community antenna service shall regularly redistrib-

ute programs broadcast by such local television broadcast station.

" (f) (2) The Commission may, by rule or order, prescribe such standards and conditions as it may find necessary to assure that the reception of the programs redistributed by the community antenna television system under subsection (1) shall be reasonably comparable in technical quality to the reception of programs of other television stations redistributed by the community antenna television system.

" (f) (3) The Commission also may, by rule or order, prescribe the period of time within which community antenna television systems shall complete preparations for and commence the redistribution of programs under subsections (1) and (2).

" (g) The Commission shall prescribe appropriate rules and regulations in order to avoid the duplication of programs broadcast or scheduled to be broadcast by a television station (other than a station engaged solely in rebroadcasting) which is assigned to a community in which a community antenna television system serves subscribers by such community antenna television system redistributing the signals of another television station. In promulgating such rules and regulations the Commission shall be guided by the standard set forth in subsection (e) of this section, requiring that due regard be given for the desirability of facilitating the continued operation of a television station which is providing the only available locally originating television broadcast program service."

The committee report explained the purpose of the bill was to place CATV under the jurisdiction of the FCC:

> This bill is designed to amend the Communications Act of 1934 so as to place community antenna television systems (CATV) under the jurisdiction of the Federal Communications Commission and to empower the Commission to issue requisite certificates of public interest, convenience, and necessity

> for the construction and operation of community antenna television systems. This bill declares CATV systems not to be common carriers and sets forth the sections of title III of the Communications Act affecting regular broadcasters that are to apply to the community antenna television systems.

S. Rep. No. 923, 86th Cong., 1st Sess. 3 (1959).

The report summarized the Commission's treatment of CATV since its inception and referred to its disclaimer of jurisdiction in *Frontier Broadcasting Co. v. Laramie Community TV Co.*, 16 P & F Radio Reg. 1005 (1958):

> The question of the FCC's jurisdiction over community antenna television systems and the type of regulation that should be imposed was raised many years ago. The FCC's files make it clear that this issue was presented to it as early as 1950 and that its staff recommended that it exert authority in this field. But, the Commission has long hesitated over the matter. In speeches by invidual commissioners and in testimony before your committee, doubt as to its power has been expressed but no official ruling was made until April 21, 1958, when the FCC decided a long-pending proceeding instituted by a group of small-town broadcasters who asked that the Commission regulate CATV systems as common carriers. (*See Frontier Broadcasting Company v. Collier*, 16 R.R. 1005 (April 1958.)) The Commission's final action in this matter made it perfectly clear that it did not intend to regulate CATV systems in any way whatsoever. However, on May 22, 1958, the FCC instituted an inquiry into the impact of community antenna television systems, television translators, television satellite stations, and television reflectors upon the orderly development of television broadcasting (docket No. 12443) and included as part of that proceeding the reconsideration of the above-mentioned *Frontier Broadcasting* case.

Id. at 5. After several amendments to the bill were offered, S. 2653 was debated on the Senate floor on May 17 and

18, 1960. Senator Pastore, chairman of the sponsoring committee, was the floor leader and explained that the bill was not designed to hurt CATV, but merely place it under regulatory control:

> This bill is not directed in any way toward injuring CATV as such. We seek merely to place CATV systems under regulation in order to protect their rights, and also to protect the rights of the only available broadcasting station, which may perish and go out of existence unless proper reforms are taken now of a very moderate nature.

106 Cong. Rec. 10417 (1960).

Senator Pastore was questioned at length on the purposes of the bill and explained it was a new delegation of authority of jurisdiction over CATV. In a brief colloquy, it was stated:

> Mr. CURTIS. First, I thank the distinguished Senator for his long efforts in a difficult area. I have given very limited study to S. 2653. It appears to me that the proposed legislation places the community antenna systems under the jurisdiction of the Federal Communications Commission. To that extent there is a delegation of authority to them. Does the bill directly prohibit or outlaw any act that the community antenna systems are doing now?
>
> Mr. PASTORE. I do not think so, aside from the fact that now they are at liberty to take a picture from a broadcasting station in Phoenix and show it in Yuma, for example. It may be earlier than the picture would be shown on the local broadcasting station in Yuma, and if the broadcasting station at Yuma made an application to the FCC, it could bring that to a stop. That would be a deprivation of some activity. That is about as far as it would go.
>
> Mr. CURTIS. The bill grants to the Commission the right to look into that situation?
>
> Mr. PASTORE. And to make rules and regulations.

Mr. CURTIS. To make rules and regulations.

But in the absence of action by the Commission, is there anything in the bill which prohibits what the community antenna systems can do?

Mr. PASTORE. I would not say so, unless the Senator sees something in the bill to the contrary.

Id. at 10425.

In answer to questions by Senator Kerr, an opponent of the bill and of the grant of jurisdiction to the FCC over CATV, Senator Pastore explained that the jurisdictional grant was necessary to develop an orderly system of TV:

> . . . [I]t is necessary to put these people under regulation, so that as new licenses are granted the Federal Communications Commission will have jurisdiction. The FCC then will be in a position to develop an orderly system of TV. However—and this must be borne in mind—insofar as harassment is concerned, or so far as a burden may be incurred, because of the duties that are imposed upon a CATV organization where there is no problem, I would assume the action of the Federal Communications Commission would be nothing more than perfunctory.

Id. at 10426. The Kerr-Pastore debate demonstrated that the issue before the Senate was whether the FCC was to gain jurisdiction over CATV through the passage of the amendment—jurisdiction which it admittedly lacked:

> Mr. KERR. Did it ever occur to the Senator from Rhode Island that there are hundreds and thousands of American Businesses in operation who are praying unto the Lord and their Government to protect them by keeping them free of regulation, rather then imposing it on them and then having them depend upon a legislative record made on the floor of the Senate which, if someone downtown whose identity we do not know, is controlled by it, will let them loose after they have paid a bunch of lawyers in Washington to come down to get them loose?

The Senator says he cannot write a bill to protect these people. Apparently the Senator does not know his own ability. . . .

. . . .

Mr. PASTORE. There was not one representative of a CATV who appeared before our committee who did not say that he wanted to be regulated. I call as my chief witness the Senator from Oklahoma [MR. MONRONEY], who is going to make the motion to recommit the bill. As a matter of fact, Senator MONRONEY introduced a bill himself to regulate the entire industry. However, that bill is only a shell. It does put them under regulation, but it does not regulate.

Mr. KERR. Next to not being under it, that is the best shape one can be in.

Ibid.

Senator Pastore urged that by conferring jurisdiction over CATV, the bill would actually provide protection to CATV systems against exorbitant charges by the broadcast station, should the stations prevail in pending copyright litigation. Senator Kerr countered that the FCC through its present jurisdiction over the broadcasters could protect CATV without extending its jurisdiction to CATV.

Mr. KERR. Did the Senator from Rhode Island say the Federal Communications Commission, which has control of the station whose signal is being picked up, could not control them without this act?

Mr. PASTORE. I did not say that.

Mr. KERR. That is what the Senator did say.

Mr. PASTORE. I said the CATV would not have any right to go before the FCC.

Mr. KERR. Who says they would not?

Mr. PASTORE. I say so.

Mr. KERR. Who prescribes that?

Mr. PASTORE. Because the Senator says they should be put under the CATV. That is just the point.

Mr. KERR. Cannot a person go into court and

ask for justice, without being set aside by the court?

Mr. PASTORE. The FCC is not a court. It is a regulatory body. We are trying to put the parties under this body with appropriate procedures.

Mr. KERR. The Senator wants to make them slaves, without provision for protection of their lives. How silly can one get?

Mr. PASTORE. I am not silly. I am talking about jurisdiction.

Mr. KERR. So am I.

Mr. PASTORE. I am talking about jurisdiction, and there is nothing silly in it.

Mr. KERR. The Federal Communications Commission does not have to be given regulatory control over any citizens to enable those citizens to go before that Federal Communications Commission and file a petition.

Mr. PASTORE. A petition to do what?

Mr. KERR. To enforce any right that an American citizen has with reference to that Commission's jurisdiction.

Mr. PASTORE. The Senator could not be more wrong than he is.

Id. at 10429-30. Senator Pastore, the floor manager, insisted that the bill was necessary to confer CATV jurisdiction upon the FCC, and that without it, the Commission was powerless to act.

Regarding the effects of the bill in conferring jurisdiction, Senator Monroney emphasized that it would provide unprecedented economic protection to broadcasters:

> The only test for the granting of a license for a television or a radio station, in the long history of the Federal Communications Act, has been, Is there a frequency available which will not interfere with the frequency assigned to someone else? A hundred television stations could be established if frequencies were available for them. If there is a radio station in Yuma, six stations could be put in if frequen-

cies could be found for them. But we have never contemplated granting economic protection to licensees until this bill was introduced. We are breaking entirely new ground, which will extend in the future to such a point that other people will want to install television in an area, and it will be necessary to provide economic protection for the local single station. I do not think such a policy has ever been established.

Id. at 10535. Senator Monroney compared the immunity from FCC regulation of reception and cable distribution by CATV to that enjoyed by the television networks:

> Mr. LONG of Louisiana. Does the bill violate the principle that the airways are free and are available to everyone?
>
> Mr. MONRONEY. I do not think it does. But it violates the principle of not having Federal regulation of cable transmission.
>
> Let me state the best illustration: All of us know that the mightiest force in television, which controls 90 percent of all television programs received by viewers in the United States, are the networks. They are not subject to regulation, and very few Members of Congress would want them to be regulated. Why? Because the concept of the Federal Communications Act is that the networks themselves are not putting anything on the air. They use cables to carry the signals to the local stations. So they are not regulated. So we do not regulate—and I do not think we should—the mighty giant of television which supplies the television diet of 50 million television sets by carrying the television program signals by cable to the viewers.
>
> But if the quite similar CATV systems are to be regulated by means of this bill, we shall be establishing a precedent; and in that event I do not see how we can properly regulate the smallest midget in the industry, but fail to give some consideration to regulating the mighty networks which are carrying signals by means of a similar system, and also without using the airways.

Id. at 10536. Senators opposing the amendment recognized that the bill was designed to provide economic protection for television.

> Mr. McCLELLAN. The meaning of the word "facilitate," as I understand it, is to make easy or less difficult; to free from difficulty or impediment. In other words, it is to facilitate the execution of a task; to lessen the labor of; to assist; aid.
>
> In other words, the station owner could petition the Federal Communications Commission to impose conditions that will facilitate, that will aid, that will remove any difficulty, that will remove encumbrance or hindrance to the continued operation of that station.
>
> Mr. MONRONEY. Which would mean limiting competition, which this bill is designed to do, from newly constructed CATV's.
>
> . . . .
>
> Mr. McCLELLAN. In other words, the rules the Commission promulgates must be promulgated to achieve that purpose. That is the proposed law we are considering. I am not saying it is not a good thing, but I think we ought to know what it does. This provision sets up a TV station in a position of preferred consideration, and in a position of preferred consideration in competition with another station.

Id. at 10537.

Senator Long registered concern over the economic advantage to broadcasters conferred by the bill.

> Mr. LONG of Louisiana. I am referring to page 4 of the bill, at line 21, where it provides:
>
> A television station * * * may petition the Commission to include in such license such conditions on the community antenna television system's operation as will significantly facilitate the continued operation of a television station which is providing the only available locally originated television broadcast program service.

> The thought that occurs to me is that it would seem to go far enough to say that the community antenna system should not impose any undue injury or hardship on the television station. However, to say that it could be required to operate in a manner to facilitate the continued operation of the competitor and system in his business, is too much to ask.
>
> . . . .
>
> Mr. LONG of Louisiana. As the law stands today there is nothing in the law by which the FCC can prevent one television station from driving another one out of business. I have seen that happen in my state, where a VHF station came into the community which had a UHF station, by providing a better signal and better programs.

Id. at 10541. Senator Hickenlooper questioned whether the proposed amendment conferring jurisdiction upon the FCC was constitutional.

> Mr. HICKENLOOPER. Mr. President, I merely wish to ask some questions of the Senator from Oklahoma or of another Member of the Senate.
>
> It seems to me that a rather complicated legal situation could arise in this instance. As I understand, a CATV station merely takes something out of the air, and does not put anything into the air.
>
> Mr. MONRONEY. That is correct.
>
> Mr. HICKENLOOPER. After it takes something out of the air—just like using the air we breathe—it then wires it, by means of a physical operation, into a house, where it is hooked up to a television set.
>
> Mr. MONRONEY. That is correct.
>
> Mr. HICKENLOOPER. What justification is there for having the Federal Government move into that regulatory field? Can it be called interstate commerce? If so, can the Federal Government then regulate my radio set in my house because I take the

signal out of the air by means of an aerial erected on top of my house?

Mr. MONRONEY. This presents a problem, because many think this is exclusively in the field of interstate commerce. Of course, the ether waves are interstate. But when the signal is taken out of the air and is transmitted to the Senator's house by cable, that is purely intrastate.

Id. at 10543. The issue to recommit the bill was plainly and openly acknowledged as an attempt to defeat it.

Mr. KERR. Mr. President, I rise in support of the motion to recommit the bill. I do it for the simple reason that I think it is an absolute necessity to protect the well-being and the opportunity for existence of over 760 small businesses. . . .

Id. at 10544.

The bill was recommitted by a vote of 39 to 38. *Id.* at 10547. A vote to reconsider failed 38 to 36. As a post mortem to the defeat of S. 2653, Senator Moss, a proponent of the bill, asked for further study by Congress as to whether, in view of the bill's failure to pass, appropriate legislation should be enacted to grant the FCC some jurisdiction over CATV in order to protect local television. *Id.* at 11462.

Throughout the lengthy debate, both proponents and opponents assumed that the legislation was necessary in order to confer jurisdiction upon the FCC over CATV. The legislation failed to pass.

II

In the 89th Congress, S. 3017 was introduced on March 4, 1966, 112 Cong. Rec. 4901 (1966). It was entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill provided no regulatory scheme or rules as did S. 2653, 86th Cong., 1st

Sess., but merely conferred jurisdiction over CATV upon the FCC. It also barred program origination by CATV, and relegated it to the role of receiving and distributing broadcast signals. This bill was submitted subsequent to the FCC's assumption of jurisdiction and was designed, in the words of its chairman as a confirmation of jurisdiction.

> The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate.
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> . . . .
>
> —Of prime importance is the proposed new section 331(a)(1) of the act, which would expressly confer upon the Commission, in broad and comprehensive terms, authority to regulate community antenna systems in the public interest. This authority is to be exercised only to the extent necessary to carry out the purposes of the Communications Act, particularly the establishment and maintenance of broadcast services and the provision of multiple reception services. There is thus a congressional recognition of the public service rendered by the broadcast and CATV industries and a directive to promote the orderly growth of both industries.

Ibid.

Also, submitted along with the explanatory statement is the dissenting statement of Commissioner Loevinger who adhered to the previous FCC rulings that it had no jurisdiction.

SEPARATE STATEMENT OF COMMISSIONER LEE LOEVINGER REGARDING PROPOSED CATV LEGISLATION

I believe it is necessary for Congress to legislate on the subject of community antenna television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field, legislative authorization is, therefore, necessary.

. . . .

It would be desirable for Congress to establish more specific standards for administrative action than are contained in the proposed bill. But it is appropriate for Congress to delegate broad authority for the Commission to act under whatever standards Congress may see fit to establish.

Accordingly I join in recommending that Congress consider the proposed bill submitted herewith and enact legislation in such form as may best express the congressional view of the proper way to deal with the problems involving FCC jurisdiction to regulate CATV systems, the operation of CATV systems, the relations of CATV systems to conventional broadcasting stations, and the relation between Federal and State jurisdiction in this field.

Id. at 4902. The bill, S. 3017, contains the following language:

That section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof a new subsection to read as follows:

" (gg) 'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes

such signals by wire or cable to subscribing members of the public who pay for such service."

SEC. 2. The Communications Act of 1934 is further amended by adding a new section to read as follows, entitled:

"COMMUNITY ANTENNA SYSTEMS

"SEC. 331. (a) The Commission shall, as the public interest, convenience or necessity requires, have authority:

"(1) to issue orders, make rules and regulations and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast service and the provision of multiple reception services;

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

"(c) Nothing in this Act or any regulation promulgated hereunder shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State or Territory, the District of Columbia, the Commonwealth of Puerto Rico or any possession of the United States except to the extent of direct

conflict with the provisions of this Act or regulations promulgated hereunder."

III

Again in the 89th Congress a bill was introduced conferring jurisdiction over CATV. H.R. 13286, 89th Cong., 2d Sess. (1966). On June 17, 1966 the House Committee on Interstate and Foreign Commerce issued H.R. Rep. No. 1635, accompanying H.R. 13286, entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill, as amended, provides:

> That (a) section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof the following new subsection:
>
> "(gg) 'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."
>
> (b) Subsection (h) of such section 3 is amended to read as follows:
>
> "(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate for foreign communications by wire or radio or in interstate or foreign transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna system shall not, insofar as the person is so engaged, be deemed a common carrier."
>
> SEC. 2 Part I of title III of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"COMMUNITY ANTENNA SYSTEMS

"SEC. 331. (a) The Commission shall, as the public interest, convenience or necessity requires, have authority –

"(1) to issue orders, make rules and regulations, and prescribe such conditions or restrictions with respect to the construction, technical characteristics and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

The Commission shall, in determining the application of any rule or regulation concerning the carriage of local broadcast stations by community antenna systems, give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on March 1, 1966, resulting from the limited channel capacity of any such systems.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

"(c) The Commission shall prescribe such rules and regulations and issue such orders as may be necessary to require the deletion by community antenna systems of signals carrying any professional

> football, baseball, basketball, or hockey contests if, after application by the appropriate league, the Commission finds that the failure to delete such signals would be contrary to the purposes for which the antitrust laws are made inapplicable to certain agreements under Public Law 87-331.
>
> "(d) Nothing in this Act or any regulation promulgated under it shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated under it."

H.R. Rep. No. 1635, 89th Cong., 2d Sess. 1-2 (1966).

In the purposes of the legislation, the Committee was cautious not to challenge the FCC's already assumed jurisdiction.

> The principal purposes of the legislation are to –
>
> (1) delineate the scope of the authority of the Federal Communications Commission to regulate CATV systems. . . .

Id. at 2. The Committee pointed out that although the Federal Communications Commission had asserted its jurisdiction over CATV, the Committee would not state a position, except to say that the Congress should confer this jurisdiction.

> In reporting the instant legislation, the committee does not either agree or disagree with the above conclusions. Test cases are pending at present in the courts. Therefore, the question of whether or not and to what extent the Commission has authority under present law to regulate CATV systems is for the courts to decide in such cases.
>
> It is the considered judgment of the committee, however, that in order properly to regulate broadcasting and communications in the United States the

> Commission should have the broad powers which the instant legislation would confer upon the Commission to regulate CATV systems.

Id. at 9.

The Commission, in its explanatory note attached to the Committee report, candidly admitted it wished the Congress to confirm jurisdiction which it had assumed.

> The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate.

Id. at 16. Commissioner Loevinger issued a separate statement explaining that although he favored the proposed legislation, he believed it necessary to confer jurisdiction upon the FCC.

> I believe it is necessary for Congress to legislate on the subject of Community Antenna Television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under the present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field legislative authorization is, therefore, necessary.

Id. at 20.

The Department of Justice, in response to a request for its views, was careful not to state an opinion as to whether the FCC had jurisdiction over CATV.

> The principal purpose of the bill is to clarify and confirm the Commission's jurisdiction over community antenna systems in order that the Commission shall have clear authority to integrate com-

munity antenna service into the national broadcast structure in such a way as to promote maximum service to everyone, including both those persons who are dependent upon off-the-air service and those who may receive cable service.

Id. at 21.

The minority report of the Committee did not hesitate to state its position that the Commission lacked jurisdiction over CATV and that the Commission had unlawfully usurped this jurisdiction.

> H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give it jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; it would thwart the judicial processes which are presently considering the issues involved; it would create an entirely new concept of regulation at the Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a person could or could not receive over his television or radio set—to name a few of the flaws.

Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the limited frequencies available in the spectrum. Regulation was for the sole purpose of properly policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

The history of the Communications Act of 1927 and the amendments thereto of 1934 reflects clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this attempt by the passage of a bill denying them the power to enter the field of economic control.

H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

A CATV system is a wired communications system and does not use the spectrum or public domain for broadcasting purposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisidction of CATV systems as such.

There are three methods by which programs can be received by a CATV system to be transmitted over its wires:

1. The pure off-the-air system. This is the case where a high antenna is employed to catch any broadcast signals that happen to come its way.

2. The microwave-fed system. This is the system where the original broadcast is rebroadcast through the spectrum, one or several times, until it reaches its desired destination. (The FCC has jurisdiction over the microwave facility because it is a rebroadcast into the spectrum, but not over the reception facility.)

3. The coaxial cable. This is a system where a coaxial cable is employed from the broadcasting station to the CATV system. If the coaxial cable does not cross a State line, the Federal Communications Commission does not have jurisdiction. If the coaxial cable does cross a State line, the jurisdiction of the FCC attaches under its jurisdiction over an interstate common carrier by wire. However, in this case the jurisdiction of the the Commission does not extend to a determination of what can or cannot be carried over the wire.

The present bill is designed to give the Federal Communications Commission absolute control over reception by all three methods. The main objective of the Federal Communications Commission is to gain control over the off-the-air (subpar. 1 above) and the coaxial cable (subpar. 3 above), for by this method the Commission can gain direct control over reception of television signals insofar as all CATV systems are concerned. It has had an indirect, limit-

ed power over CATV systems using microwave. The operator of a microwave facility must get a license from the Federal Communications Commission because he is transmitting radio signals. The Commission has taken the position that it can issue a license with restrictions and conditions as to what the microwave operator can transmit, even though section 326 of the Communications Act prohibits censorship.

If the Congress passes H.R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals—jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite transmittals, as well as local broadcasting stations and network broadcasts. Freedom requires that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

. . . .

It is to be noted that the Federal Communications Commission, although previously denying jurisdiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it

wants badly—an entirely new concept in governmental regulation.

The Congress of the United States should not abdicate its legislative powers and delegate to a commission the power to write substantive law by rules and regulations promulgated by an appointed body.

If the Federal Government is to enter a new field of regulation, the manner and extent to which this will be undertaken should be definitely and explicitly spelled out by the duly elected representatives of the people of this country in the Congress of the United States and not by a board, a bureau, or a commission wholly and completely insulated from the electorate.

Id. at 23-25.

The minority views, in respect to the powers of the Commission and its lack of jurisdiction over CATV, were not disputed by the majority, which merely urged passage of the legislation. A second minority report also strenuously objected to the jurisdictional grab by the FCC.

Community antenna television systems have been around since 1950, and until 1965 the Federal Communications Commission very clearly indicated that it did not pretend to have jurisdiction over the transmission of broadcast signals by cable. In fact it specifically denied having such jurisdiction. Suddenly, however, the Commission did a complete turnabout and argued that it had always possessed authority to regulate cable television as an extension of broadcasting and its recognized interstate character. By a 5 to 2 decision the Commission determined that the Communications Act of 1934 meant something else and something more than it clearly is. When we consider the fact that the makeup of this Federal agency changes rapidly, such action can lead to dangerous consequences.

Apparently uncertain of its ground, the Commission prepared and suggested a most peculair piece

of legislation which is H.R. 13286. Even a casual reading of this bill will indicate that it makes no attempt to determine a broad policy under which the CATV industry should develop in conjunction with the broadcasting industry. Instead it merely grants broad authority, throwing the whole problem to the Federal Communications Commission and hoping for the best.

Most of the 30 amendments which were offered by members of the committee during the deliberations on this bill were intended to show the will of Congress and to provide reasonably clear guidelines. They were offered in an attempt to make this bill at least reasonably consistent with past principles for the regulation of industry. They were defeated.

The result of passing H.R. 13286 would be to create havoc within an industry of great importance to the public because the policies adopted by the Commission for its regulation today could well be reversed or radically changed a month or a year hence. There are no general principles to which the industry can point or by which the Congress may oversee the activities of its creature, the Federal Communications Commission.

In the case of broadcasting facilities the Federal Communications Commission must allocate a frequency and issue a license therefor. In the case of community antenna systems there is no provision for licensing, but the bill does grant authority to issue permits for construction. This of course means that construction authority can be denied to any applicant. Under the terms of this bill construction permits would be within the complete discretion of the Commission. In our opinion this grants to the Federal Communications Commission a completely unacceptable and probably unconstitutional power over this industry.

> There are presently pending lawsuits which will determine whether or not the Federal Communications Commission was right when it first denied having jurisdiction over CATV or whether it was right later when it reversed itself. Also pending are lawsuits to determine the applicability of the copyright laws to material carried by CATV systems. The determination of these matters requires no legislation and little purpose is served in passing such legislation at this time, particularly since it does not purport to lay down realistic policies and guidelines within which regulation of the CATV industry can logically proceed.

Id. at 26-27. The bill failed to reach the floor for vote.

APPENDIX B

Legislative History of Section 4(i) of the Communications Act of 1934

Section 4(i) first appeared in H. R. 8301, 73d Cong., 2d Sess. (1934), was carried into S. 2910, and S. 3285, 73d Cong., 2d Sess. (1934), without change, and was finally enacted as section 4(i) of the Communications Act of 1934, 48 Stat. 1066, 47 U.S.C. § 154(i) (1960).

In the Senate Interstate Commerce Committee report on S. 3285, S. Rep. No. 781, 73d Cong., 2d Sess. (1934), there is no specific discussion of section 4(i). And as to the entirety of section 4, the Committee's only comment is:

> Section 4: Provides for a bipartisan commission of five members with terms of 6 years at an annual salary of $10,000.

Id. at 3. The House Committee's comments on S. 3285 were equally abbreviated. Like the Senate Committee's report, there is no specific comment on section 4(i) in the report of the House Interstate and Foreign Commerce Committee on S. 3285, H. Rep. No. 1850, 73d Cong., 2d Sess. (1934). As to the entirety of section 4, however, the following comment appeared:

> Section 4 provides for a bi-partisan commission of 7 members, holding office for 7-year terms at a salary of $10,000.[1] *It also provides for the appointment of personnel and contains other provisions usual in the case of the creation of a new administrative body.*

Id. at 5 (emphasis added).

At the same time, however, the Senate Interstate Commerce Committee stated:

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[1] The 7-member, 7-year-term provisions substituted by the House for the 5-member, 6-year-term provisions proposed by the Senate were accepted by the Conference Committee.

> This bill is so written as to enact the powers which the Interstate Commerce Commission and the Radio Commission now exercise over communications. . . .
>
> In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communications companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective.

S. Rep. No. 781, *supra*, at 3.

Section 4(i) was evidently derived from Section 17 of the Interstate Commerce Act, 24 Stat. 385, as amended, 49 U.S.C. § 17(3) (1964), and at the hearings on the proposed Communications Act, Interstate Commerce Commissioner McManamy testified:

> Presumably paragraph (i) of the section [4] is intended to cover the same ground as the following provision in section 17(1) of the Interstate Commerce Act:
>
> "The [Interstate Commerce] Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division of the Commission, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States."
>
> This is the specific provision under which this [Interstate Commerce] Commission prescribes its rules of practice and the forms of pleadings before it. Paragraph (i) is more general in terms and may be sufficiently broad in scope to cover rules of practice and forms of pleading. Those matters are of such importance, however, that the question of the [Fed-

> eral Communications] Commission's authority should not be left in doubt.

Hearings on H. R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 90 (1934); Hearings on S. 2910 Before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 202 (1934).

The only legislative reference to section 17 of the Interstate Commerce Act (as section 14 of S. 1532, 49th Cong., 2d Sess. (1886) is found in the remarks of Senator Cullum, the sponsor of S. 1532:

> Section [17] relates to the conduct of the work of the Commission.

17 Cong. Rec. 3474 (1886).